Supreme Court, U. S.
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No. 74-1369

In the Supreme Court of the United States

OCTOBER TERM, 1974

BEINE J. BURRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was entitled to the appointment of counsel to represent him on his post-appeal motion for reduction of sentence.

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of possessing a pistol without a license, in violation of 22 D.C. Code 3204. He was sentenced to three years' imprisonment to run consecutively to his sentence on an earlier felony conviction. Petitioner appealed from the conviction to the District of Columbia Court of Appeals, but then dismissed the appeal (Pet. App. 1a). Thereafter, he moved *pro se* under Rule 35(a), Super. Ct. Crim. R.,[1]

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[1]Rule 35(a), which is identical to Fed. R. Crim. P. 35, provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is

for reduction of sentence, and requested that the court appoint counsel. Without acting on the latter request, the trial court denied the motion. The District of Columbia Court of Appeals affirmed (Pet. App. A).

1. Petitioner contends (Pet. 4-7) that under the Sixth Amendment he was entitled to appointment of counsel.[2] A motion for reduction of sentence is addressed to the sound discretion of the trial court. *E.g.*, *United States* v. *Jones*, 490 F.2d 207, 208 (C.A. 6), certiorari denied, 416 U.S. 989; *United States* v. *Maynard*, 485 F.2d 247, 248 (C.A. 9); *Green* v. *United States*, 481 F.2d 1140, 1141 (C.A. D.C.). Such a motion is directed to "a sentence which has already become final in every respect" (*United States* v. *Behrens*, 375 U.S. 162, 165), and ordinarily requires neither a hearing nor the presence of the movant or his attorney. Fed. R. Crim. P. 35; *United States* v. *Jones*, *supra*, 490 F.2d at 208; *United States* v. *Maynard*, *supra*, 485 F.2d at 248; *United States* v. *Birnbaum*, 421 F.2d 993, 998 (C.A. 2), certiorari denied, 397 U.S. 1044.

As petitioner acknowledges (Pet. 4-5), this Court has never held than an indigent prisoner is constitutionally entitled to appointed counsel in seeking the discretionary relief authorized by Rule 35, and the holding of the court of appeals that petitioner was not so entitled does not conflict with the decision of any court of appeals. Moreover, that conclusion was correct and is supported by recent decisions of this Court holding that the Constitution does not oblige the government to appoint counsel for indigent convicts whose parole or probation is being

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imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

[2]Neither here nor in the court of appeals has petitioner challenged the trial court's denial of his motion for reduction of sentence (see Pet. App. 2a).

revoked (*Gagnon* v. *Scarpelli*, 411 U.S. 778, 787-791) or who are seeking discretionary review of their convictions. *Ross* v. *Moffett*, 417 U.S. 600. See also *Wolff* v. *McDonnel*, 418 U.S. 539, 569-570.

2. Petitioner also contends (Pet. 10-13) that he had a "due-process right to counsel" because his motion for reduction of sentence was based on his asserted rehabilitation and his eligibility for a work-release job if his sentence were reduced.[3] Since the court of appeals acknowledged the possibility that due process might in some circumstances require that trial courts, in the exercise of discretion, appoint counsel for an indigent defendant seeking reduction of sentence (Pet. App. 7a), the only question presented by the petition in this regard is whether on the particular facts of this case the trial court abused its discretion in declining to appoint counsel. The court of appeals correctly held that it did not, and that ruling does not warrant further review.[4]

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[3]Petitioner does not specify how he was denied an entitlement to liberty or property protected by the due process clause of the Fifth Amendment. Petitioner had no constitutional or statutory right to work-release (*United States* v. *Green*, *supra*, 481 F.2d at 1141), and the considerations underlying his motion are more properly addressed to the Board of Parole. See *United States* v. *Maynard*, *supra*, 485 F.2d at 248.

[4]Petitioner cites no significant prejudice as a result of the district court's failure to appoint counsel. The grounds on which he sought reduction of sentence, whether taken individually or collectively, did not compellingly justify such action, and petitioner tacitly concedes that the denial of his motion was within the court's discretion. That denial was presumably based, not on the absence of substantiation of petitioner's claims (the only purpose for which petitioner says an attorney was needed (Pet. 7)), but upon the court's decision, after "review[ing] the presentence report as well as the memorandum of points and authorities in support of the motion and the other documents appended to the motion * * *" (Pet. App. 9a), that those claims simply did not justify a discretionary reduction of sentence.

3. The court of appeals' rejection of petitioner's present[5] contention (Pet. 7-10) that he was entitled to appointment of counsel under the Criminal Justice Act, 18 U.S.C. 3006A, was correct, involves no conflict among the courts of appeals, and does not merit further review.[6]

The Criminal Justice Act[7] entitles an indigent criminal defendant to representation by appointed counsel "at every stage of the proceedings * * * through appeal, including ancillary matters appropriate to the proceedings."

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[5]In the court of appeals, petitioner (then represented by counsel) contended only that he was entitled on constitutional grounds to appointment of counsel; the court of appeals raised *sua sponte* the question whether he was entitled to counsel under the Criminal Justice Act.

[6]Petitioner also makes a conclusory assertion that he was entitled to appointment of counsel under "court rules" (Pet. 2, 7), apparently referring to Superior Court Rule 44, which closely follows Rule 44(a), Fed. R. Crim. P. (see Pet. 8). That contention, however, was not made below and is not properly presented by the petition. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the correctness of an interpretation of a local court rule by the highest court of the District of Columbia does not merit review by this Court (cf., *e.g.*, *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285), even if review of such a ruling would still be permissible. Cf. 28 U.S.C. 1257; *Palmore* v. *United States*, 411 U.S. 389, 395-396.

[7]At the time of petitioner's request for appointment of counsel, the pertinent provisions of the Criminal Justice Act were "applicable in the District of Columbia." 18 U.S.C. 3006A(*l*). Effective September 3, 1974, however, the Act was explicitly rendered inapplicable to the Superior Court of the District of Columbia, in view of the enactment of parallel provisions of the District of Columbia Code specifically concerning appointment of counsel in that court. 11 D.C. Code 2603, added by 88 Stat. 1091; see 18 U.S.C.A. (Supp. 1975) 3006A(1). Accordingly, the decision of the court of appeals in this case is unlikely to have a lasting effect upon the interpretation of the Criminal Justice Act in the District of Columbia.

18 U.S.C. 3006A(c).[8] Petitioner was represented by counsel "through appeal" and was entitled to no further representation under the Act. *Dirring* v. *United States*, 353 F.2d 519, 520 (C.A. 1), certiorari denied, 377 U.S. 1003.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[8]Petitioner does not explicitly rely upon the reference to "ancillary matters." As the court of appeals correctly noted (Pet. App. 6a), the legislative history of the addition of that language in 1970 reveals that it contemplated proceedings, such as *habeas corpus ad testificandum* to secure testimony and hearings as to mental competency to stand trial, that are "technically outside the scope of the trial proper" but are necessary "in defending the principal criminal charge * * *." S. Rep. No. 91-790, 91st Cong., 2d Sess. 6-7 (1970); H.R. Rep. No. 91-1546, 91st Cong., 2d Sess. 9 (1970).

[9]Petitioner's claim of conflict between the decision below and the interpretation given to the Criminal Justice Act by court administrative offices in compensating appointed counsel (Pet. 9-10) is unsound. As the court of appeals recognized (Pet. App. 6a, n. 6), the limitations on a defendant's entitlement to appointment of counsel under the Act are not necessarily the same as the limitations on services of counsel, once appointed, that are compensable under the Act.